

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In the Matter of the complaint of J.E. BRENNEMAN : CIVIL ACTION  
CO., INC., Bare Boat Charter of the Crane Barge : NO. 01-1442  
ATLAS, for Exoneration from or Limitation of Liability :  
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In the Matter of the Complaint of COMMERCE : CIVIL ACTION  
CONSTRUCTION CORPORATION, INC. as an alleged : NO. 01-2099  
successor to J.E. Brenneman Co., Inc., Bare Boat Charter :  
of the Crane Barge ATLAS, for Exoneration from or :  
Limitation of Liability

**MEMORANDUM and ORDER**

YOHN, J.

March\_\_\_\_\_, 2003

Presently before the court is the motion of defendants Michael J. Asbell and Eli Karetny (“defendants”) for a protective order temporarily staying their depositions. For the reasons that follow, the motion will be granted.

**Background**

On May 18, 2000, Pier 34 in Philadelphia, which housed a restaurant and night club, collapsed, claiming the lives of three individuals and injuring numerous others. Def. Br. at 2; Pl. Br. at 1. As a result of the collapse, the victims of this tragedy brought multiple personal injury

and wrongful death suits in the Philadelphia Court of Common Pleas against Portside Investors (“Portside”) and HMS Ventures (“HMS”), entities which respectively leased and owned the pier, both of which, in turn, brought separate suits against plaintiff J.E. Brenneman Co., Inc. (“Brenneman” or “plaintiff”) for negligence, breach of contract, contribution, and indemnity arising from work it performed on the pier at Portside and HMS’ request in 1994, 1995 and 1996. Def. Br. at 2; Pl. Br. at 1-2. On September 22, 2000, Judge John Herron of that court ordered that all cases arising out of the pier’s collapse should be consolidated and coordinated. Def. Br. Exh. A. Soon thereafter, Brenneman and defendants Asbell and Karetny, who are principals of Portside and HMS,<sup>1</sup> respectively, were joined as defendants in the state court cases. Def. Br. at 3; Pl. Br. at 2.

On March 27, 2001, Brenneman filed the current claim in this court pursuant to the Shipowners’ Limitation of Liability Act, 46 U.S.C. § 181 et seq., which allows shipowners in certain situations to limit their liability for maritime accidents to the value of their vessel and its cargo. Def. Br. at 3; Pl. Br. at 2-3. Soon thereafter, pursuant to the statutorily-required procedure, the parties who had claims against Brenneman filed those claims in this case.<sup>2</sup> Additionally, Brenneman and several of the claimants brought cross claims, third-party claims, or both, seeking contribution and indemnification from one another, or asserting tort and contract claims against parties other than Brenneman. *See* Third-party Compl. of Hudson Engineering (Doc. #10); Third-party Compl. of Commerce Construction Corp. (Doc #14); Third-party Compl.

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<sup>1</sup> Asbell is a principal shareholder and officer of M.J. Asbell, Inc., which is a general partner of Asbell & Associates, L.P., which in turn is a general partner of Portside. Def. Br. at 3 n. 3. Karetny is the president of HMS. *Id.* at 3 n. 4.

<sup>2</sup> In limitation proceedings, they are dubbed “claimants.”

of Suburban Propane, L.P. (Doc. #71); Third-party Compl. of Portside Investors, L.P. (Doc. #87); Cross claim by Brenneman (Doc. #122); Counter/Cross claim by HMS Ventures, Inc. (Doc. #126); Third-party Compl. of Brenneman (Doc. #149).

Of particular importance to the instant motion, Asbell and Karetny also face criminal charges arising from their alleged involvement with the pier's collapse. Specifically, on August 21, 2001, they were arrested and charged with the following: 1) involuntary manslaughter; 2) recklessly endangering another person; 3) risking a catastrophe; 4) failure to prevent a catastrophe; and 5) criminal conspiracy. Def. Exh. E. After a preliminary hearing, defendants were bound over for trial in the Philadelphia Court of Common Pleas. On June 4, 2001, however, Common Pleas Court Judge Benjamin Lerner dismissed the two felony charges, a decision which the District Attorney is currently appealing. Def. Br. at 6; Def. Exh. F.

As the criminal case was mounting, so were defendants' fears that information discovered in their civil case might incriminate them in their criminal case. Consequently, on December 7, 2001, Asbell and Karetny obtained a ninety day protective order from Common Pleas Court Judge Alan Tereshko, staying further discovery as to them. Pl. Br. at 4. It is unclear to this court whether that order has been extended. On October 3, 2002, plaintiff served notices of deposition on Asbell and Karetny, who in turn filed the instant motion, requesting that this court stay their depositions for one hundred and twenty days. Pl. Br. at 4.

### **Discussion**

Pursuant to the Fifth Amendment of the U.S. Constitution, defendants have a right not to disclose information which might incriminate them in pending criminal cases. *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself

...”).<sup>3</sup> In order to protect that right, defendants have asked this court pursuant to Federal Rule of Civil Procedure 26(c) to temporarily stay their depositions in the civil proceedings for fear that they might reveal information that could incriminate them in their criminal cases. Because a short stay would not 1) significantly hamper the expediency of the civil litigation, 2) substantially prejudice plaintiff, or 3) burden this or any other court considering the parties’ claims, the court will grant defendants’ motion.

This court recognizes that “the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.” *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980)(*en banc*), *cert. denied*, 449 U.S. 933 (1980). The court’s authority to issue such a stay “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936) (citing *Kansas City Southern R. Co. v. United States*, 282 U.S. 760, 763 (1931); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 382 (1935); *see also Texaco, Inc. v. Borda*, 383 F.2d 607, 608 (3d Cir. 1967) (quoting same).

In determining whether to stay civil proceedings, the court should examine the following

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<sup>3</sup> Plaintiff argues that defendants have waived this right by initiating state civil actions against plaintiff in which their attorneys produced documents containing statements regarding the collapse of Pier 34, the source of which could only have been defendants. Pl. Br. at 10-12; *id.* at 16-18. Defendants, however, are not plaintiffs in the state court proceeding simply by virtue of the fact that their corporations are plaintiffs. Consequently, the court rejects plaintiff’s argument as, at best, misleading and grossly inaccurate.

factors: “(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.” *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers*, 87 F.R.D. 53, 56 (E.D.Pa.1980); *see also State Farm Mut. Automobile Ins. Co. v. Beckham-Easley*, 2002 WL 31111766 at \*1 (Sept. 18, 2002 E.D.Pa); *Walsh Securities, Inc. v. Cristo*, 7 F. Supp. 2d 523, 526- 27 (D.N.J. 1998); *In re Residential Doors Antitrust Litigation*, 900 F. Supp. 749, 756 (E.D.Pa. 1995).

In this case, there is no evidence that staying the depositions for a period of time will measurably prejudice plaintiff. First, there is little risk that the defendants, both of whom are healthy, will become gravely ill in the near future. Second, an immediate resolution of plaintiff’s case is not likely. There are multiple claims brought by and against plaintiff in both state and federal courts. Third, it can hardly be argued that granting the stay would strip plaintiff of its ability to proceed with the litigation. Plaintiff did not dispute defendants’ statement that few of the third-party defendants “have made any significant document production and very few depositions related to them have taken place.” Def. Br. at 22.<sup>4</sup>

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<sup>4</sup> Plaintiff argues that, at this point in the litigation, any discovery other than the depositions of defendants is “ancillary,” and hence spending time on anything other than these depositions would be an inefficient and wasteful use plaintiff’s legal resources. Pl. Br. at 5. The court is bewildered by this argument considering that plaintiff initiated suits against many of these third-parties. *See* Third-party Compl. of Brenneman (Doc. #149) (bringing suit against GK Management Inc., Eagle Restaurant Associates, Inc., Robert R. Rosen Associates, Grimaldi Contractors, Site Engineers, Matty Brothers Construction, Tamburri Associates, inc., The City of

In contrast, the burden on the defendants is large enough to warrant a stay of a short duration. The overlap between the issues in the civil and the criminal cases is extensive. In both cases, the parties seek to determine whether defendants 1) told plaintiff that the pier was at risk of imminent collapse or 2) actively concealed or failed to disclose that fact. In short, in both cases, the court needs to determine if defendants are responsible for the pier's collapse. As a consequence of this overlap, defendants are forced to either produce possibly incriminating information that would assist the prosecution of their criminal case, or potentially lose multi-million dollar lawsuits.<sup>5</sup> Moreover, granting a temporary stay of defendants' depositions in no way inconveniences this court. Indeed, considering the duplicity of the issues, it would conserve judicial resources to wait and see if the criminal case can quickly be disposed of rather than holding the depositions only to have defendants refuse to answer any of plaintiff's questions.<sup>6</sup>

In short, because of 1) the limited nature of the requested stay, 2) the minor burden on plaintiff, 3) the comparatively greater burden on defendants, and 4) the absence of any inconvenience to or burden on the judiciary, defendants' motion for a temporary stay of their

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Philadelphia, Department of Licences and Inspections); *see also* Def. Br. at 22 (listing virtually all of these parties as those who have yet to participate meaningfully in discovery).

<sup>5</sup> This factor alone would not sway the court. Consequently, it is not likely that defendants can escape their depositions in perpetuity. Indeed, they may be required to appear at their depositions before the end of their criminal prosecution. For now, however, the short time period of the stay and the less than significant burden on plaintiff leads the court to conclude that the interests of justice warrant the stay.

<sup>6</sup> In its brief, plaintiff failed to address the fourth and fifth factors listed in the *Golden Quality* test; namely, the interests of non-parties and the public. Neither, however, is particularly relevant in this case because 1) the pier has been closed since the accident, thereby eliminating any threat to non-parties and 2) the public's interest in a fair trial is not implicated by deposing individuals who are defendants in similar and simultaneous civil and criminal cases.

depositions will be granted.

### **Conclusion**

For the reasons stated above, defendants are entitled to a temporary stay of their depositions. Consequently, their motion will be granted. An appropriate order follows.

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**Order**

And now on this \_\_\_\_\_ day of March, 2003, upon consideration of defendants' Motion for a Protective Order Temporarily Staying the depositions of Michael J. Asbell and Eli Karetny (Docs. # 178 and 186) and plaintiff's opposition thereto (Doc. # 185); it is hereby ORDERED that defendants' motion is GRANTED as follows:

1. The depositions of Michael J. Asbell and Eli Karetny are hereby STAYED in these actions until further Order of the Court;
2. The parties to these coordinated proceedings may petition the Court for modification or other relief respecting this stay not before 120 days from the date



of this Order;

3. Counsel for Michael J. Asbell and Eli Karetny shall report to the court by letter at 60 day intervals as to the status of the criminal cases;
4. This order affects only the cases pending before this court and is without prejudice to the right of the state court to make whatever judgment it feels is appropriate in the state court proceedings.

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William H. Yohn, Jr., Judge